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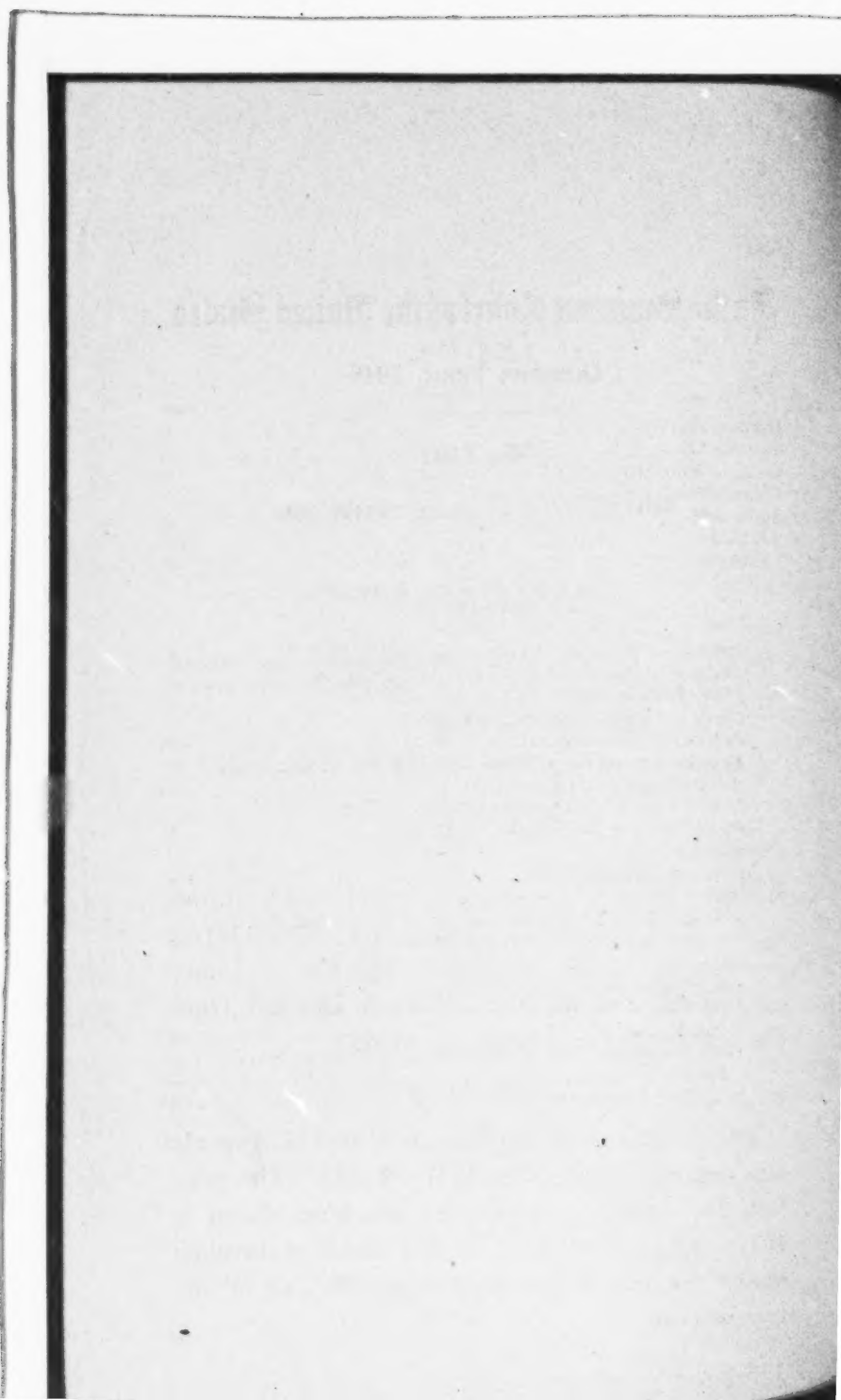
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# **In the Supreme Court of the United States**

OCTOBER TERM, 1946

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No. 1103

EDWARD C. COMMERS, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## **OPINION BELOW**

The opinion of the District Court of the United States for the District of Montana (R. 18-34) is reported at 66 F. Supp. 943. The Circuit Court of Appeals, for the Ninth Circuit affirmed from the bench without opinion (R. 47-48).

## **JURISDICTION**

The judgment of the Circuit Court of Appeals was entered January 16, 1947 (R. 48). The petition for a writ of certiorari was filed March 7, 1947. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the

Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTION PRESENTED

Whether a person, who is drafted into the armed forces of the United States and is injured while serving therein, may sue and recover from the United States damages for loss of "bodily integrity" and earning power, on the theory that there has been a taking of his body for public use without the payment of just compensation therefor.

#### CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment is as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

#### STATEMENT

Petitioner, Edward C. Commers, was inducted into the military service on October 19, 1942,

pursuant to the provisions of the Selective Training and Service Act of 1940, c. 720, 54 Stat. 885 (50 U. S. C. App. 301 *et seq.*) (R. 4). Prior to that time he was earning, as a manual laborer at least \$200 per month (R. 8). After receiving his basic training he was assigned to the 6th Infantry Division of the United States Army and served with that Division in various campaigns in New Guinea and the Philippine Islands (R. 4-6). In these campaigns he received severe injuries and was afflicted with malaria and other diseases and tropical maladies (R. 5-7). During his service in the Army, from which he was discharged on August 6, 1945, he was awarded two Silver Stars,<sup>1</sup> one Bronze Star Medal,<sup>2</sup> three Purple Hearts,<sup>3</sup> and a Good Conduct Medal<sup>4</sup> (R. 4, 6, 16).

On March 26, 1946, petitioner filed an amended complaint in the District Court of the United States for the District of Montana alleging that because of the injuries and sicknesses which he had suffered during his Army service he is unable to follow any substantial gainful occupation as a

<sup>1</sup> Awarded for gallantry in action. See Army Regulations 600-45, 22 September 1943, par. 13.

<sup>2</sup> Awarded for gallantry in action, to recognize minor acts of heroism in actual combat. Army Regulations 600-45, 22 September 1943, as changed by Changes No. 3, 25 April 1944, par. 151½.

<sup>3</sup> Awarded for wounds received in action. Army Regulations 600-45, 22 September 1943, as changed by Changes No. 7, 14 July 1945, par. 16.

<sup>4</sup> Awarded for exemplary behavior, efficiency, and fidelity. Army Regulations 600-68, May 4, 1943.

manual laborer, and that it is reasonably certain that his disabilities will continue in a totally disabling degree throughout his life (R. 7). He is now receiving from the Veterans' Administration of the United States for his disabilities the sum of \$34.50 a month when he is not hospitalized and \$20 a month when he is in a hospital (R. 8).

The petitioner prayed for a declaratory judgment holding in substance, (1) that the taking of his body and earning power for use in the military forces of the United States was a taking of private property for a public use; (2) that the United States is obligated not only under the Fifth Amendment, but as a matter of natural right, to make just compensation to petitioner and all other veterans disabled in World War II; (3) that petitioner and all other disabled war veterans are constitutionally entitled to try their claims for bodily impairment in the district courts of the United States and to have the jury trial guaranteed by the Seventh Amendment; (4) that the consent of the United States to be sued upon the claims of its war disabled is implied from the Fifth Amendment (R. 15-16).

The United States filed a motion to dismiss the complaint on the grounds that it did not state a claim upon which relief could be granted and that the court was without jurisdiction as the United States had not consented to be sued in this manner (R. 17). The judgment of the District Court

(R. 35) granting the motion to dismiss was affirmed by the court below without opinion (R. 48).

#### ARGUMENT

Petitioner contends that the admitted power of the United States to raise armies by conscription (Pet. 21) is subject to the provision of the Fifth Amendment that "private property" shall not be taken for public use without just compensation, that any soldier whose "bodily integrity and earning power have been consumed in the common defense" is entitled to compensation therefor, and that such soldier may have the existence and extent of his disabilities determined in the courts of the United States and be "justly compensated therefor as a matter of constitutional right" (Pet. 7, 8).

Petitioner's contentions have a certain philosophical appeal, but that is their only merit. Whatever may be the scope of the Fifth Amendment with respect to property destroyed in the course of actual military operations (*United States v. Pacific Railroad*, 120 U. S. 227), the short and conclusive answer to petitioner's argument is that, since the ratification of the Thirteenth Amendment, there has been no property right in a living human body. And, while that Amendment ended slavery and all other forms of involuntary servitude (*Clyatt v. United States*, 197 U. S. 207; *Bailey v. Alabama*, 219 U. S. 219; *United States v. Reynolds*, 235 U. S. 133), it did



not terminate the numerous civic duties which require the citizen to devote his labor and if need be, his life, to the service of the community. In those categories are included the duty to render military service (*Selective Draft Law Cases*, 245 U. S. 366), the duty to labor for a reasonable time on public roads near his residence without direct compensation (*Butler v. Perry*, 240 U. S. 328), and the duty to assist the police to enforce the justice of the state (*Matter of Babington v. Yellow Taxi Corp.*, 250 N. Y. 14, *per* Cardozo, Ch. J.)

This Court has several times pointed out the nature of the obligation of military service. *Jacobson v. Massachusetts*, 197 U. S. 11, 29; *Selective Draft Law Cases*, 245 U. S. 366, 378. In the latter case, Chief Justice White said, in words which have frequently been quoted:

It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it.

The same thought is expressed in the Congressional declaration contained in Section 1 (b) of the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U. S. C. App. 301 (b):

that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service.



The basic fallacy of petitioner's view is that he confounds the nation's right to compel the citizen's obligation to render military service with a taking of property. Once that distinction is recognized, his entire case falls. It may be a distinction which is historical rather than logical, but it is well settled; and, here also, "Upon this point a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U. S. 345, 349. Consequently we do not deem it necessary to discuss the technical jurisdictional infirmities of the present complaint, which are adequately disposed of in the opinion of the District Court (R. 30-39).

#### CONCLUSION

Petitioner's case is quite without merit, and the court below properly affirmed, from the bench, the dismissal of the complaint. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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APRIL 1947.